

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**
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In RE: THE STUDENT

Name of School Attending:
KELLY MILLER MIDDLE SCHOOL

Case No.:
Student ID No.:

**STUDENT DISCIPLINE
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. Introduction

Date of Incident: January 23, 2012

Date of Hearing: February 14, 2012 Time: 9:15 a.m.

Proposed Disciplinary Action: ☒ Long Term Suspension of 37 days

Parties at Hearing:

II. Recommendation of Administrative Law Judge

- ☐ Judgment for Appellee (DCPS): Affirm Proposed Disciplinary Action
☒ Modify Proposed Disciplinary Action
☐ Judgment for Appellant (Student): Dismiss Proposed Disciplinary Action

III. Jurisdictional Statement

Pursuant to a Memorandum of Understanding entered between the District of Columbia Public Schools (DCPS) and the Office of Administrative Hearings (OAH), OAH serves as the Chancellor's designee for student discipline hearings required to be held before an impartial hearing officer. OAH is an independent agency that is a neutral, impartial tribunal that holds hearings and decides appeals from various agency decisions. DCPS is bound by these findings of fact and conclusions of law and may not change them. Based on these findings of fact and conclusions of law, DCPS will determine the appropriate discipline to be imposed. Although a recommendation for discipline has been made in these findings, DCPS is not bound by the recommendation and may impose any discipline permitted by the student discipline regulations. Applicable regulations can be found in the District of Columbia Municipal Regulations (DCMR) at 5 DCMR B2500 (DCPS student discipline regulations) and 1 DCMR 2900 (OAH student discipline rules).¹

IV. Procedural History

This is the second hearing in this case.

Administrative Law Judge Louis Burnett held the first evidentiary hearing in this matter on January 31, 2012. The first hearing was based on DCPS's January 26, 2012 Notice of Proposed Disciplinary Action which classified THE STUDENT's conduct as a Tier IV offense, and requested an Off-Site Long-Term Suspension of 89 days. At the time of the first hearing, DCPS had received THE STUDENT's grandmother's request that it evaluate THE STUDENT

¹ Copies of the applicable regulations in the DCMR can be found on line at <http://www.dcregs.dc.gov/>.

for a possible disability associated with behavior problems, but had not made a manifestation determination. Judge Burnett heard evidence from both parties and issued Findings of Fact and Conclusions of Law in which he found that OAH did not have jurisdiction to hear the case because DCPS had not yet made a manifestation determination. Judge Burnett also held that on January 23, 2012, THE STUDENT stole a teacher's iPod, and that on January 24, 2012, THE STUDENT returned the iPod.

After this administrative court returned the case to DCPS, DCPS held a manifestation determination meeting which THE STUDENT's grandmother attended. The MDT Team found that the January 23, 2012 theft was not a manifestation of a disability. At the time of the second hearing in this matter, DCPS had not yet completed the eligibility process to determine whether THE STUDENT had a disability. DCPS then issued a second Notice of Proposed Disciplinary Action, dated February 6, 2012, which continued to classify the theft as a Tier IV offense, but requested a shorter Off-Site Long-Term Suspension of 37 days. This administrative court set a second hearing on February 14, 2012 at 9:15 a.m.

On February 10, 2012, the court held a telephone status conference attended by [REDACTED]
[REDACTED]
[REDACTED]. The parties agreed that THE STUDENT did steal the Ipod, and returned it the next day, and that the only issues remaining for the second hearing were whether the Tier IV classification was accurate, and whether the Long-Term Suspension of 37 days was appropriate.

V. Due Process

Pursuant to the District of Columbia Public School's student discipline regulations, a student who has been suspended for 11 days or more or who has been expelled shall have a disciplinary hearing before an impartial hearing officer. 5 DCMR B2505.15. The regulations require that DCPS provide the parent or guardian with written notice of the recommended disciplinary action that sets forth the reasons for the discipline and that DCPS notify the parent or guardian in writing that a hearing is scheduled at OAH. 5 DCMR B2506.2.

On February 6, 2012, DCPS provided THE STUDENT's grandmother with a written notice of the modified proposed disciplinary action. On February 9, 2012, DCPS notified THE STUDENT's grandmother by first class mail, and notified counsel by email, that a second hearing was scheduled at OAH on February 14, 2012 at 9:15 a.m..

Shortly before the first hearing in this matter, THE STUDENT's grandmother, [REDACTED], requested that THE STUDENT be evaluated to determine if she has a disability related to ongoing behavior problems. On January 31, 2012, the date of first hearing in this matter, DCPS had not completed the disability assessment. A student with a disability who is suspended for 11 or more days must have a meeting to determine whether the student's behavior was a manifestation of his or her disability. 5 DCMR B2510. On January 31, 2012, DCPS had not made a manifestation determination. On February 6, 2012, DCPS held a manifestation determination meeting, which THE STUDENT's grandmother attended. DCPS determined that THE STUDENT's behavior was not a manifestation of the student's disability. Therefore, DCPS may discipline THE STUDENT in the same manner as non-disabled students. 5 DCMR B2510.5.

Ms. [REDACTED] and THE STUDENT appeared for the second hearing, again represented by Ms. [REDACTED] and Ms. [REDACTED], and were given the opportunity to present evidence and cross-examine DCPS's witnesses. The following witness(es) testified on behalf of DCPS:

[REDACTED]. THE STUDENT testified on her own behalf. The following witness(es) also testified on behalf of the student: [REDACTED]

[REDACTED]. Accordingly, due process procedures have been properly followed. At the second hearing, I admitted into evidence one document which the court labeled Exhibit 111. However, Judge Burnett admitted a different document labeled Exhibit 111. So I change the label for Exhibit 111 to Exhibit 111A.²

VI. Findings of Fact

THE STUDENT is a 7th grade student at Kelly Miller Middle School. She has lived with her grandmother, [REDACTED], her entire life. Her mother has been in and out of her life due to repeated incarceration, as well as other reasons.

When THE STUDENT was in 5th grade at Seed Public Charter School, her grandmother began sending her to individual counseling because THE STUDENT was having behavior problems both at home and in school. Seed also provided in-school counseling. Nonetheless, after THE STUDENT finished 6th grade at the Seed, her grandmother transferred her to Kelly Miller Middle School because Seed was "having complications with her behavior." When Ms. [REDACTED] transferred THE STUDENT to Kelly Miller, she -- quite unintentionally -- did not give

² I also held a document which I labeled as Exhibit 112 under advisement, pending a second request for admission by DCPS following the presentation of THE STUDENT's case. I change the label to Exhibit 112A. DCPS did not seek admission the second time, so I have excluded Exhibit 112A from evidence.

the full details of THE STUDENT's previous behavior problems, or Seed's attempts to work with these problems, to the administrators at Kelly Miller.

Within days of starting at Kelly Miller, THE STUDENT started incurring disciplinary infractions. Most of the infractions involved talking in or disrupting class or leaving the classroom without permission. Exhibit 111A. THE STUDENT admitted at the hearing that she does not like being told that she is wrong, by peers or by adults, and that she will argue when she believes she is right. This includes arguing with peers and teachers in class and in the hallways. She also starts arguments with teachers and students when she perceives that someone is treating her disrespectfully, without finding out if the person actually meant to be disrespectful.

However, by September 8, 2011, THE STUDENT was involved in a fight at school, and Kelly Miller gave her an Off-Site Short-Term Suspension. *Id.* Between the start of school and the January 23, 2012 theft which gave rise to this case, THE STUDENT incurred 27 infractions. *Id.* DCPS addressed most of these infractions with in-school discipline, including verbal redirection, temporary removal from the classroom, In-School Suspensions, and not permitting her to participate in after school sports programs. *Id.* DCPS gave Off-Site Short-Term Suspensions in two other instances in October 2011. *Id.* When THE STUDENT was on In-School Suspensions, she was in the Student Resource Center ("SRC") monitored by a teacher who was designated as the SRC Coordinator. She sometimes worked on the same assignments her classmates were receiving, but sometimes worked on assignments which were grade appropriate, but not aligned with her regular classes.

On September 30, 2011, DCPS placed THE STUDENT on a behavior contract. THE STUDENT was supposed to get a log from the office each day, have each teacher sign the log

and describe her behavior in class, then submit the signed log back to a school official. Between September 2011 and January 2012, THE STUDENT only submitted four completed logs.

At some point in December 2011 or January 2012, Kelly Miller officials, including school social workers Mr. [REDACTED] and Ms. [REDACTED], and Assistant Principal [REDACTED], convened a Student Support Team (“SST”) for THE STUDENT. The SST conducted a Functional Behavior Assessment (“FBA”) which, among other things, tried to identify triggers which seemed to be related to THE STUDENT’s behavior. The FBA identified, for the first time, that at least some of THE STUDENT’s disruptive and angry behaviors were related to anger over her mother’s incarceration. In January 2012, DCPS used the FBA to implement a Behavior Improvement Plan. DCPS invited Ms. [REDACTED] to at least one of the SST meetings regarding the FBA and the Behavior Improvement Plan.

During this time, Ms. [REDACTED] had started changing THE STUDENT’s individual therapy to Youth Villages, which offers in-home and in-school family therapy. Youth Villages started with an assessment period, which takes approximately three months. Youth Villages student social worker [REDACTED] began providing family therapy to THE STUDENT and her grandmother on November 19, 2011. THE STUDENT has started to improve her behavior at home.

As part of the family therapy, Ms. [REDACTED] went to the school to meet with THE STUDENT on a regular basis. Ms. [REDACTED] also suggested to school officials that they implement some positive methods for improving THE STUDENT’s behavior, including encouraging “pro-social behaviors” in extra-curricular activities by placing her with students who are high achieving; letting her return to after school sports programs, having her run extra laps as

discipline, rather than putting her out of sports programs; and not publically putting her out of class when she is disruptive. Ms. [REDACTED] also suggested that Kelly Miller provide in-school counseling. Neither Ms. [REDACTED] nor anyone else from Youth Villages provided any copies of the assessment documents which Youth Villages used to generate these suggestions to Kelly Miller officials. At the time of the second hearing, Kelly Miller officials had not put many of Ms. [REDACTED] suggestions into practice.

On January 23, 2012, THE STUDENT was angry at Ms. [REDACTED], one the teachers she usually liked, because she believed that Ms. [REDACTED] had treated her disrespectfully. THE STUDENT stole Ms. [REDACTED] Ipod. On January 24, 2012, after Ms. [REDACTED] inquired about the missing Ipod, THE STUDENT returned it. Please see Judge Burnett's Findings of Fact and Conclusions of Law dated February 1, 2012, incorporated by reference, for further details. THE STUDENT has been out of class and/or on an In-School Suspension since January 24, 2012.

THE STUDENT is extremely bright. Throughout her moving between regular classrooms and the SRC in her first few months at Kelly Miller, she has continued to perform well in her academic classes. THE STUDENT enjoys sports. Although Kelly Miller restricted her from participating in after school sports after she was disruptive in those activities, she took gym every day as her elective in the Fall semester. In the Winter semester, she is not taking gym.

VII. Conclusions of Law and Appropriateness of Proposed Disciplinary Action

The Notice of Proposed Disciplinary action charged the student with "Documented theft of school or personal property without force," which is a Tier IV infraction under DCPS's regulations. 5 DCMR B2502.4(a)(2). Based on the established facts in this case, I find that the

student has committed the infraction charged. For Tier IV infractions, the regulations provide for the following possible disciplinary responses: off-site Short-Term Suspension; off-site Medium-Term Suspension; or off-site Long-Term Suspension. 5 DCMR B2502.4(b).

THE STUDENT's counsel argued at the telephone status hearing that the court should treat this as a Tier III infraction, "Lying to or giving misleading information to school staff." 5 DCMR B2502.3(a)(17). Counsel argued that THE STUDENT lacked intent to steal because she returned the Ipod, and because she stole the Ipod in anger. This argument is not persuasive.

THE STUDENT's testimony, as well as her demeanor at the hearing demonstrated that she stole the Ipod, and disrupted class and fought repeatedly, not out of anger that she cannot control, but out of a desire to run things her way. THE STUDENT knows each time that she acts out exactly what she is doing, and why it is wrong. However, she ignores her knowledge of right and wrong because, as she told me at the hearing, she does not like being proven wrong. She has decided that it is more important to teach students and teachers a lesson about proving her wrong than it is to obey the rules. She also testified that one big reason why she does not like suspension, in or out of school, is that there is no one to talk to. She testified that when she is in the SRC, she tries to say hi to people walking by the classroom, and is told to be quiet by the teacher. Of course she knows that she should not talk during class unless she has permission to discuss her school work. Here again, she has decided it is more important to get her way than to do what is right for everyone.

This attitude is what caused THE STUDENT to steal the Ipod. She believed that Ms. [REDACTED] was disrespectful to her. So she took the Ipod to teach Ms. [REDACTED] a lesson. She then held onto the Ipod for nearly 24 hours before she returned it. THE STUDENT had intent to steal, and

was not acting out of emotion. These are not the actions of a child whose emotions are out of control. It was THE STUDENT using her intelligence to manipulate adults. Thus DCPS accurately classified the Ipod theft as a Tier IV offense.

THE STUDENT's desire to run the show, and punish students and teachers for actual or perceived disrespect, may well arise out of the fact that THE STUDENT has no control over when, or if, she sees her mother. However, the fact that THE STUDENT's deliberate choices to disrupt and argue and fight and steal arise from legitimate anger and helplessness about her mother does not mean that THE STUDENT should not see consequences for her knowing and deliberate choices.

In this case, DCPS recommended a disciplinary response of Long-Term Suspension. The regulations provide that disciplinary responses should be "logical, appropriate, and instructive." 5 DCMR B2500.9. In making a recommendation, I have considered the following factors from 5 DCMR B2500.9: the nature of the infraction; circumstances relating to the infraction; the age of the student; the student's previous behavioral history; previous participation in counseling; the safety to other students and staff; the educational needs of other students; and THE STUDENT's educational needs.

Specifically, I have considered several mitigating factors. This was a theft that did not implicate anyone's safety, including THE STUDENT's. THE STUDENT returned the Ipod voluntarily. THE STUDENT is 12 years old, and rarely sees her mother, both because her mother has been in and out of prison, and because her mother is usually unavailable even when she is not in prison. THE STUDENT is very intelligent; if she starts choosing to use her smarts to advance herself rather than to run school and home her way, and exact revenge for very minor

slights, she will go far in school and in her career. THE STUDENT's grandmother is working with Youth Villages, which has designed a comprehensive program which is already causing THE STUDENT to improve her behavior at home. Although THE STUDENT has been in counseling for her behavior issues for more than two years, the counselors and school have not been working together to help her to improve her conduct.

However, I must also consider several aggravating factors. THE STUDENT has only been at Kelly Miller for six months, and she has already amassed 27 infractions. She has repeatedly and deliberately disrupted many classes, which distracts her fellow students, who may not be as bright as she is, from learning in class. She has been in at least one fight at Kelly Miller. All of this occurred while she was receiving counseling. THE STUDENT displayed some of these deliberate disruptive behaviors at the hearing, leaving to go to the bathroom in the middle of a witness's testimony, and chewing gum not once but twice, even after I specifically told her to spit it out. THE STUDENT knows full well that neither of these behaviors was permissible in court. She did them to, once again, set her own rules. This attitude will hold THE STUDENT back in high school and college, and in any job she takes. This attitude could also get THE STUDENT in serious trouble with the law soon.

I also note that the school is using only consequences in its attempts to change THE STUDENT's behavior, and that Youth Villages is using only rewards to change THE STUDENT's behavior. I suggest that THE STUDENT needs both rewards for good behavior and consequences for poor behavior. Ms. [REDACTED] suggested that THE STUDENT's teachers should not put THE STUDENT out of class when she is disruptive because it makes her feel "picked on." THE STUDENT's teachers cannot teach the other students in class if they cannot take THE STUDENT out of the classroom when she is disruptive. Further, THE STUDENT

should not be encouraged to use her genuine emotional need for counseling as a means to continue her efforts to run the show her way, not the school's way. She told me that she would be OK with being put out of class when she got in an argument so long as she and the person she was arguing with went immediately to counseling. She told me this right after she told me that she argues not only when she has been disrespected, but also when she has been proven wrong. Thus her proposed solution still gives her carte blanche to disrupt class, then continue the argument with a counselor, rather than not acting on the feeling that she was disrespected, but finding an appropriate place and manner to express those feelings.

When THE STUDENT returns to school, I urge Youth Villages to consider using rewards and consequences, and to explain its proposed reward system and help school officials to set it up. I urge Kelly Miller to at least try using rewards, and work with Youth Villages to set up meaningful consequences.

Accordingly, I find that THE STUDENT will not learn if she feels no genuine consequences for stealing a teacher's Ipod to teach the teacher a lesson. Thus, THE STUDENT needs disciplinary action. However, the proposed 37 day suspension is excessive. I recommend that DCPS modify the proposed disciplinary action. In modifying the disciplinary action, I recommend that DCPS impose the following alternative discipline: Off-Site Short-Term Suspension of 21 Days, to include "time served," the 13 days she spent in In-School Suspension

This is NOT a final administrative decision. These findings of fact and conclusions of law are being sent only to the District of Columbia Public Schools, Office of Youth Engagement, in order for DCPS to issue a Final Notice of Disciplinary Action, which will include a copy of this recommendation.

Date: February 15, 2012

Sharon E. Goodie
Administrative Law Judge